

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket 96-45
)	
NPCR, INC. d/b/a NEXTEL PARTNERS)	DA 04-998
)	
Supplement to Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the Commonwealth of Pennsylvania)	
_____)	

**NEXTEL PARTNERS' REPLY TO COMMENTS
OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners"), by its undersigned counsel, hereby submits its "Reply" to the Comments filed on May 7, 2004 by the Pennsylvania Public Utility Commission ("PaPUC") in the above-captioned proceeding.¹ As detailed below, the FCC has jurisdiction over Nextel Partners' April 3, 2003 Petition for Designation ("Petition") as an Eligible Telecommunications Carrier ("ETC") in the Commonwealth of Pennsylvania, and should proceed to a grant of the Petition on its merits.

INTRODUCTION

In response to the Commission's April 12, 2004 Public Notice the staff of the PaPUC requests that the Commission not consider Nextel Partners' ETC Petition for Pennsylvania until after the PaPUC has completed its review of the question of state jurisdiction in two ongoing proceedings relating to *other* unrelated wireless carriers².

¹ See FCC Public Notice, DA 04-998 (released April 12, 2004).

² PaPUC Comments at 3 n.3.

As detailed below, there is no legitimate reason for the Commission to delay consideration of Nextel Partners Petition and the PaPUC's request should be denied. The PaPUC's decision, more than one year ago, not to assert jurisdiction over Nextel Partners is final and cannot now be revisited by the Commonwealth. The PaPUC itself actively participated in Nextel Partners' ETC designation before the Commission, submitting substantive comments on Nextel Partners' Petition, thus ensuring that its interests have been fully aired and considered. Any attempt by the PaPUC to revisit the jurisdictional issue at this late time as it relates to Nextel Partners would be both legally flawed and inherently inequitable.

In its letter ruling of more than a year ago, the PaPUC unequivocally declined to assert jurisdiction over Nextel Partners, triggering Commission jurisdiction over this proceeding. Having assumed jurisdiction, the Commission has a legal obligation under Section 214(e)(6) of the Communications Act of 1934, as amended (the "Act") to proceed to resolution of this matter on the merits. Equitable principles also demand that the Commission move forward with consideration of the Petition. Nextel Partners has expended considerable resources in prosecuting its Petition before the FCC and would suffer significant harm by further delay or termination of the federal proceeding at this time. On the other hand, a Commission resolution of this proceeding would not harm the PaPUC in any way.

A. The PaPUC Affirmatively Declined to Assert Jurisdiction Over Nextel Partners, Thereby Triggering the Instant Federal Proceeding

The FCC has jurisdiction over Nextel Partners' Petition in accordance with the requirements of Section 214(e)(6) of the Act, which "requires the Commission to conduct a designation proceeding in instances where the relevant state commission lacks, for

whatever reason, the authority to perform the designation.”³ In accordance with detailed procedures established by the Commission under Section 214(e)(6), in order to initiate the federal proceeding Nextel Partners was required to include with its Petition “an affirmative statement from a court of competent jurisdiction or the state commission that it lacks jurisdiction to perform the designation.”⁴ In its *Twelfth Report and Order* in Docket 96-45, the Commission determined that “an ‘affirmative statement’ of the state commission may consist of *any duly authorized letter*, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier.”⁵

Nextel Partners filed with its Petition a letter ruling from the PaPUC that clearly and unequivocally stated that Nextel Partners is not subject to PaPUC jurisdiction for a determination of ETC status.⁶ The PaPUC Letter Ruling declared:

[T]he Pennsylvania Public Utility Commission hereby affirmatively states that the Commonwealth of Pennsylvania does not exercise jurisdiction over commercial mobile radio service providers for purposes of making determinations concerning eligibility for Eligible Telecommunications Carrier designations under 47 U.S.C. Section 214(e) and 47 C.F.R. 54.201, *et seq.* See 66 Pa. C. S. § 102.⁷

³ *In the Matters of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, 15 FCC Rcd 12208 (2000) (“*Twelfth Report and Order*”) at ¶ 105.

⁴ See *Twelfth Report and Order* at ¶ 113; see also *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419 (rel. Dec. 29, 1997)

⁵ *Twelfth Report and Order* at ¶ 113 (emphasis added).

⁶ February 28, 2003 Letter from James J. McNulty, Secretary, Pennsylvania Public Utility Commission, to Ronald J. Jarvis, (Attachment 2 to Nextel Partners’ Petition) (“*PaPUC Letter Ruling*”).

⁷ The PaPUC’s interpretation of 66 Pa. C.S. § 102 that as a wireless carrier Nextel Partners is not a “public utility” subject to ETC regulation by the PaPUC is consistent with the interpretation of this provision by the Pennsylvania Supreme Court. See *Crown Communications v. Zoning Hearing Board of Glenfield*, 705 A.2d 427 (1997).

The PaPUC Letter Ruling concluded,

*“In particular, the Pennsylvania Public Utility Commission affirms that Nextel Partners is not subject to regulation in the Commonwealth of Pennsylvania for purposes of the foregoing determination.”*⁸

The PaPUC Letter Ruling *expressly* declining to assert jurisdiction with respect to designation of Nextel Partners as an ETC clearly satisfies the federal statutory jurisdictional requirement set forth in Section 214(e)(6) of the Act.

B. Having Assumed Jurisdiction Over Nextel Partners Petition, The FCC Must Move Forward To Resolution On The Merits

In light of Nextel Partners’ jurisdictional showing, the Commission properly initiated this federal designation proceeding over a year ago. Having lawfully initiated this proceeding pursuant to its authority under Section 214(e)(6) of the Act, the Commission must now retain jurisdiction over, and decide, Nextel Partners’ Petition.

The Commission commenced this proceeding on June 12, 2003 by providing public notice of Nextel Partners’ Petition and seeking comments from interested parties, including the PaPUC.⁹ In response to the initiation of the federal proceeding, the PaPUC again *confirmed* its lack of jurisdiction over Nextel Partners.¹⁰ Highlighting its ruling *not to* assert jurisdiction over Nextel Partners, the PaPUC then took the opportunity to

⁸ *PaPUC Letter Ruling* at 1 (emphasis supplied).

⁹ *Public Notice*, DA 03-1929.

¹⁰ See July 14, 2003 Reply Comments of the PaPUC at 1-2 (“Pennsylvania has refrained from exercising jurisdiction over CMRS for purposes of making determinations concerning eligibility for ETC designations under 47 U.S.C. § 214(e) and 47 C.F.R. §§ 54.201, *et seq.*, 66 Pa. C.S. § 102.”)

provide substantive comments for consideration by the Commission in its evaluation of the Petition.¹¹

Despite the fact that the PaPUC's jurisdictional ruling was unequivocal when made, and was later acknowledged by the PaPUC in an appearance before the Commission, the PaPUC staff now urges the FCC to simply disregard the Commonwealth's decision to decline jurisdiction as it relates to Nextel Partners. The PaPUC staff urges the Commission to halt its ongoing designation proceeding at the eleventh hour, and await a revisited jurisdictional ruling in the context of petitions from *other carriers*. Such a delay would serve no legitimate purpose, is contrary to law and would severely and unfairly prejudice Nextel Partners, who has acted in good faith reliance on the PaPUC's clearly-stated jurisdictional position.

The PaPUC staff provides no legal authority to demonstrate that, having already declined jurisdiction, thereby triggering a Commission designation proceeding pursuant to Section 214(e)(6) of the Act, the PaPUC would have the right to now assert jurisdiction over Nextel Partners at this late stage of the on-going federal proceeding. In fact, legal precedent establishes that once the Commission asserts jurisdiction over a matter under a provision of the Communications Act it will *not* relinquish that jurisdiction to a state that has had an opportunity to claim jurisdiction but has failed to do so.

¹¹ For example, the PaPUC stated, "...in states such as Pennsylvania where utility regulators have refrained from exercising jurisdiction over CMRS providers, the FCC must assure that the ETC designation is not simply an attempt to secure federal monies without assurances that the monies be used for the intended purposes in high cost and low income areas..." PaPUC July 14, 2003 Reply Comments at 6.

For example, in the context of jurisdictional determinations pursuant to Section 252 of the Act, the Commission has affirmed the principle that, “once we assume jurisdiction of a matter pursuant to section 252(e)(5), any and all further action regarding that proceeding or matter will be before the Commission, rather than before the state commission that has failed to act.”¹² Most significantly, the Commission has made clear that it will *not* remand an ETC case to a state once that state has “issued an order indicating that it did not have jurisdiction to perform the designation” of a particular carrier.¹³

C. Failure Of The Commission To Retain Jurisdiction Over This Matter Would Be Fundamentally Unfair And Will Result In Unnecessary Delay And Financial Harm To Nextel Partners

The Commission’s decisions to retain jurisdiction over on-going proceedings are not only legally sound but are consistent with fundamental notions of fair play and equity. In the instant proceeding, Nextel Partners would suffer substantial financial harm if the federal proceeding is terminated or unnecessarily delayed. On the other hand, the Commonwealth is not negatively impacted in any way if the FCC retains jurisdiction and rules on the merits of the Petition.

As noted above, Nextel Partners sought its jurisdictional ruling from the Commonwealth more than one year ago. Relying in good faith on that ruling, Nextel Partners then filed its Petition with the Commission. Consideration of the Petition has

¹² *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*, 13 FCC Rcd 1755 at ¶ 5 (1997) (emphasis in original).

¹³ *In the Matter of the Federal-State Joint Board on Universal Service, Petition for Western Wireless Corporation’s Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 19144 (2001) (“*Western Wireless*”) at ¶ 16 and n.35.

already been delayed well beyond the Commission's six month guideline period because of the Commission's efforts to resolve general issues relating to the ETC designation process. Further delay is certainly not in the public interest.

Nextel Partners has expended significant time and resources in filing and prosecuting its Petition before the Commission. Considerable effort has gone into the mapping of designated areas, construction budgets, engineering analysis, development of Lifeline/Link-up plans, advertising and other related matters. In addition, significant legal, engineering, travel and other associated costs have been incurred during the one-year-plus federal proceeding.

If the Commission were to relinquish jurisdiction at this late juncture much of the effort Nextel Partners expended in preparing and filing its Petition, replying to commenters, meeting with Commission staff, supplementing its Petition pursuant to the changes in Commission policies and now responding to comments on its supplemental filing will be for naught. Given the length of time that this proceeding has been pending and the substantial expenses already incurred by Nextel Partners, it would be fundamentally unfair to require Nextel Partners to restart its ETC request in a different forum.¹⁴

On the other hand, if the Commission retains jurisdiction over the Petition, the PaPUC will suffer no harm. The Commonwealth is protected in the instant proceeding because substantive issues that the Commonwealth may have with respect to Nextel

¹⁴ Moreover, commencing an entirely new designation proceeding before the PaPUC would be likely to significantly delay the ultimate date of Nextel Partners' designation as an ETC, causing Nextel Partners to forego significant high cost funding that it otherwise might have been entitled to if designated sooner, and depriving rural consumers in Pennsylvania of the benefits associated with the entry of a competitive, wireless ETC in their service areas.

Partners' Petition can and have been raised before this Commission. As noted, the PaPUC has already commented on the merits of Nextel Partners' Petition in its July 14, 2003 Reply Comments. In addition, contrary to the concerns of the PaPUC staff, retention of jurisdiction by the Commission in this proceeding will have no bearing on the PaPUC's ability to revisit the jurisdictional issue with respect to future ETC applications filed by wireless carriers in Pennsylvania.

The PaPUC staff incorrectly states that "federal jurisdiction in Nextel's case may establish exclusive federal jurisdiction of the question in subsequent cases brought by other wireless carriers."¹⁵ However, the Commonwealth is free to re-examine the jurisdictional question in a proceeding of general applicability or in the context of specific ETC requests from other carriers.¹⁶ It is well-settled that a state can amend its ETC jurisdictional standards relating to subsequent carriers and ETC cases on a forward-going basis.¹⁷ In addition, it is well settled that "each carrier serving non-tribal lands is required to receive an affirmative statement from the state commission that it lacks

¹⁵ PaPUC Comments at 3-4.

¹⁶ Indeed, the PaPUC acknowledged as much in a November 10, 2003 public notice to Telecommunications Carriers operating in Pennsylvania. That notice stated that "A prior Secretarial Letter issued February 28, 2003 to Nextel Partners, Inc. stating that the Commission does not exercise jurisdiction of wireless carriers for ETC purposes, should not be construed as a Commission order of general applicability on the question." The notice went on to clarify that it "is not to imply the Commission intends to exercise jurisdiction to designate wireless carriers as ETCs." Thus, this public notice makes clear that while the PaPUC specifically declined to assert jurisdiction with respect to Nextel Partners, other carriers are required to seek specific decisions from the Commonwealth or obtain a general ruling by the PaPUC. The carriers specified in the staff comments of the PaPUC now seek that determination. See PaPUC Comments at 3, n.3.

¹⁷ In refusing to remand Western Wireless' Wyoming ETC petition to that state following a change in jurisdictional standards by Wyoming, the Commission specifically pointed out that the "designation of Western Wireless has no bearing on any future wireless carrier designation proceedings in Wyoming." *Western Wireless, supra* at ¶ 16.

jurisdiction over the carrier, *regardless of whether similarly situated carriers have received such affirmative statements.*”¹⁸

Based on this clear legal precedent, the PaPUC’s February 28, 2003 decision not to assert ETC jurisdiction over Nextel Partners does not preclude reconsideration of the jurisdictional issue as applied to other carriers, even if those carriers are “similarly situated.” Accordingly, the PaPUC’s extraordinary request for the Commission to withhold action on Nextel Partners’ Petition is unnecessary to protect any state interest.

CONCLUSION

In view of the foregoing, Nextel Partners respectfully requests that the Commission deny the PaPUC’s request to delay a determination on the merits of Nextel Partners’ Petition. Because all applicable legal and public interest requirements have been met, Nextel Partners requests that the Commission promptly grant Nextel Partners’ Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania.

¹⁸ *Western Wireless, supra* at ¶ 16 (emphasis supplied).

Respectfully submitted,

NPCR, INC. d/b/a NEXTEL
PARTNERS

By [signed]
Albert J. Catalano
Matthew J. Plache
Ronald J. Jarvis
Catalano & Plache PLLC
3221 M Street, NW
Washington, DC 20007
(202) 338-3200 voice
(202) 338-1700 facsimile

Counsel for Nextel Partners

May 14, 2004